83-428

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SEP 14 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 198__

NO. _____

DANNY BARWICK,

PETITIONER,

-VS-

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF

THE STATE OF SOUTH CAROLINA

LESTER L. BATES, JR.
COUNSEL FOR PETITIONER

POST OFFICE BOX 1485
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QUESTION PRESENTED FOR REVIEW

WHETHER THE INDICATION BY A PROSECUTION TO THE JURY DURING CLOSING ARGUMENT OF THE PERSONAL BELIEF OF THE PROSECUTOR AS TO THE GUILT OF THE DEFENDANT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

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REPORT OF OPINION BELOW

THE OPINION OF THE SOUTH CAROLINA SUPREME COURT IN THIS CASE, OFFICIALLY REPORTED AS STATE V. BARWICK, ____ S.C. ____, ____ S.E.2D ____(1983)(OP.NO.21932) IS SET OUT AS APPENDIX A.

GROUNDS FOR JURISDICTION

THE OPINION OF THE SOUTH CAROLINA SUPREME COURT WAS ENTERED ON MAY 26, 1983. A PETITION FOR REHEARING WAS TIMELY FILED AND WAS DENIED ON JULY 18, 1983. THIS PETITION FOR WRIT OF CERTIORARI WAS FILED WITHIN SIXTY (60) DAYS AFTER THE DENIAL OF THE PETITION FOR REHEARING BY THE SOUTH CAROLINA SUPREME COURT. THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED
UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN, SECTION 1

ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

STATEMENT OF THE CASE

DANNY BARWICK, THE PETITIONER, WAS INDICTED BY THE SUMTER COUNTY, SOUTH CAROLINA GRAND JURY UPON AN INDICTMENT ALLEGING THAT HE AND A LINDA O'CAIN DEFRAUDED AN INSURANCE COMPANY. THE PETITIONER WAS THE MAYOR OF PINEWOOD, SOUTH CAROLINA AND IS AN AUTOMOBILE DEALER BY PROFESSION. O'CAIN WAS AN ADJUSTER FOR THE ALLEGEDLY DEFRAUDED INSURANCE COMPANY.

THE PETITIONER WAS ACCUSED OF ASSISTING O'CAIN IN SUBMITTING FALSIFIED DOCUMENTS TO THE INSURANCE COMPANY FOR FICTITIOUS CLAIMS FOR COMPENSATION ARISING FROM THREE AUTOMOBILE ACCIDENTS. IN RESPONSE TO THESE CLAIMS, THE INSURANCE COMPANY ISSUED PAYMENTS TO THE ALLEGED VICTIMS OF THE ACCIDENTS. THE THEORY OF THE STATE WAS THAT O'CAIN AND THE PETITIONER CONVERTED THESE PAYMENTS TO THEIR OWN USE.

O'CAIN TESTIFIED ON BEHALF OF THE STATE AND WAS THE ONLY WITNESS TO DIRECTLY IMPLICATE THE PETITIONER IN THE ALLEGED CRIME. THE PETITIONER WAS ACQUITTED OF THOSE COUNTS ALLEGING CRIMINAL ACTS ARISING FROM TWO OF THE TRANSACTIONS AND WAS CONVICTED OF FOUR COUNTS ALLEGING CRIMINAL CONDUCT ARISING FROM THE THIRD TRANSACTION. THE PETITIONER WAS SENTENCED TO THREE YEARS, SUSPENDED UPON THE SERVICE OF SIX MONTHS AND THE PAYMENT OF A FINE OF $2500 AND TWO YEARS PROBATION.

A NOTICE OF INTENT TO APPEAL WAS TIMELY FILED AND THE APPEAL WAS HEARD. AFTER ORAL ARGUMENT BEFORE THE SOUTH CAROLINA SUPREME COURT, THE CONVICTION WAS AFFIRMED. A REHEARING WAS DENIED ON JULY 18, 1983, BUT A STAY OF JUDGMENT WAS ENTERED PENDING A DECISION ON THE PETITION FOR CERTIORARI.

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS FIRST RAISED BEFORE THE SOUTH CAROLINA SUPREME COURT.

REASONS FOR THE ALLOWANCE OF THE WRIT

THE CASE SQUARELY PRESENTS TO THE UNITED STATES SUPREME COURT A SIGNIFICANT QUESTION OF DUE PROCESS RIGHTS THAT HAS YET TO BE ANSWERED: WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS VIOLATED BY THE INDICTATION BY A PROSECUTOR TO THE JURY DURING CLOSING ARGUMENT OF THE PERSONAL BELIEF OF THE PROSECUTOR AS TO THE GUILT OF THE DEFENDANT.

THE UNITED STATES SUPREME COURT HAS NEVER DEALT WITH THE ISSUE DIRECTLY, ALTHOUGH ALMOST ALL FEDERAL COURTS OF APPEAL AND STATE SUPREME COURTS HAVE BEEN PRESENTED WITH THE QUESTION AND HAVE REACHED WIDELY DIFFERENT CONCLUSIONS. SEE, GENERALLY, 41 A.L.R.FED.10.

THE ARGUMENT IN THIS CASE OCCURRED DURING THE PROSECUTION'S CLOSING ARGUMENT,

WHEN IT WAS STATED BY THE PROSECUTOR TO THE JURY:

> "AND I'LL TELL YOU THIS, THESE OFFICERS, SHERIFF REEVES AND WAYNE SIMS AND SLED (SOUTH CAROLINA LAW ENFORCEMENT DIVISION) AGENT JOHN JOHNSON, MYSELF, AND THE OTHER PEOPLE THAT HAVE BEEN INVOLVED IN IT, FOLKS, WE WOULD'T BE HERE IF WE DIDN'T BELIEVE IN THIS CASE."

AN IMMEDIATE OBJECTION WAS MADE BY DEFENSE COUNSEL AND SUSTAINED BY THE TRIAL COURT. NO CURATIVE INSTRUCTION WAS EVER GIVEN BY THE TRIAL COURT.

THERE CAN BE NO QUESTION THAT THIS WAS A DIRECT REFERENCE TO THE PERSONAL BELIEF OF THE PROSECUTOR THAT HE THOUGHT THE PETITIONER TO BE GUILTY AND THAT LOCAL LAW ENFORCEMENT OFFICIALS THOUGHT THE PETITIONER GUILTY. THE COMMENT WAS ACERBATED BY THE

LACK OF EVIDENCE WHICH THE STATE HAD INTRODUCED IN THE CASE, THE MAIN EVIDENCE CONSISTING OF THE TESTIMONY OF O'CAIN, AN INDICTED CO-CONSPIRATOR.

THE SUPREME COURT HAS NOT DEALT WITH THIS ISSUE IN THE CONTEXT OF SUCH REFERENCES BY A STATE PROSECUTOR IN A STATE TRIAL. HOWEVER, IN THE CONTEXT OF FEDERAL TRAILS, THE SUPREME COURT HELD SUCH STATEMENTS IMPROPER IN LAWN V. UNITED STATES, 355 U.S. 339(1958). IN LAWN, THE ASSISTANT UNITED STATES ATTORNEY ARGUED IN HIS CLOSING SUMMATION THAT "WE (THE PROSECUTION) VOUCH FOR (OUR WITNESSES) BECAUSE WE THINK THEY ARE TELLING THE TRUTH." ID., AT 359(N.L5). THE SUPREME COURT STATED THAT THESE COMMENTS DID NOT MANDATE REVERSAL BECAUSE NO OBJECTION WAS RAISED, THE REMARK WAS FAIR RETALIATION FOR EARLIER REMARKS OF DEFENSE COUNSEL, A CURATIVE INSTRUCTION BY THE TRIAL COURT AND BECAUSE "(T)HE GOVERNMENT'S ATTORNEY DID NOT SAY NOR IN-

SINUATE THAT THE STATEMENT WAS BASED ON PERSONAL KNOWLEDGE OR ON ANYTHING OTHER THAN THE TESTIMONY OF THOSE WITNESSES GIVEN BEFORE THE JURY..." ID.

IN BERGER V. UNITED STATES, 295 U.S. 78(1935) AND HALL V. UNITED STATES, 150 U.S. 76(1893), BOTH OF WHICH WERE FEDERAL CRIMINAL TRIALS, THE SUPREME COURT REVERSED CONVICTIONS WHERE THE PROSECUTOR HAD INDICATED HIS PERSONAL BELIEF AS TO THE GUILT OF THE DEFENDANT. OF COURSE, A FAILURE TO OBJECT AT THE TIME THE COMMENTS ARE MADE BY THE PROSECUTION WAIVES THE ERROR. UNITED STATES V. SOCONY-VACUUM, 310 U.S. 150(1940).

UNDER THE ABOVE CASES, A RULE HAS CLEARLY EMERGED IN FEDERAL CRIMINAL TRIALS THAT IT IS IMPROPER FOR A PROSECUTOR TO PRESENT TO THE JURY HIS PERSONAL VIEW AS TO THE GUILT OF THE DEFENDANT. SINCE THE ABOVE AUTHORITIES APPLY TO FEDERAL TRIALS, THE ISSUE PRESENTED HERE IS WHETHER THE DUE

PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES A SIMILAR STANDARD FOR STATE TRIALS.

DUE PROCESS STANDARD

IN DUNCAN V. LOUISIANA, 391 U.S. 145 (1968), JUSTICE WHITE SET FORTH THE FOLLOWING STANDARD FOR MAKING THE DETERMINATION WHETHER A PARTICULAR SAFEGUARD IS REQUIRED BY DUE PROCESS:

> THE QUESTION THUS IS WHETHER ... A PARTICULAR PROCEDURE IS FUNDAMENTAL -- WHETHER, THAT IS, A PROCEDURE IS NECESSARY TO AN ANGLO-AMERICAN REGIME OF ORDERED LIBERTY. IT IS THIS SORT OF INQUIRY THAT CAN JUSTIFY THE CONCLUSIONS THAT STATE COURTS MUST EXCLUDE EVIDENCE SEIZED IN VIOLATION OF THE

> FOURTH AMENDMENT (CITATION OMITTED), THAT STATE PROSECUTORS MAY NOT COMMENT ON A DEFENDANT'S FAILURE TO TESTIFY (CITATION OMITTED), AND THAT CRIMINAL PUNISHMENT MAY NOT BE IMPOSED FOR THE STATUS OF NARCOTICS ADDICTION (CITATION OMITTED) ... (IN MAKING THE DETERMINATION) IT MIGHT BE SAID THAT THE LIMITATION IN QUESTION IS NOT NECESSARILY FUNDAMENTAL TO FAIRNESS IN EVERY CRIMINAL SYSTEM THAT MIGHT BE IMAGINED BUT IS FUNDAMENTAL IN THE CONTEXT OF THE CRIMINAL PROCESSES MAINTAINED BY THE AMERICAN STATES.

THEREFORE, IN THE CASE SUB JUDICE IT MUST BE DETERMINED WHETHER COMMENTS BY A STATE PROSECUTOR AS TO HIS PERSONAL

BELIEF IN THE GUILT OF THE ACCUSED VIOLATE DUE PROCESS IN THAT THE ALLOWANCE OF SUCH COMMENTS CONTRADICTS FUNDAMENTAL CONCEPTS IN THE CONTEXT OF THE CRIMINAL PROCESS MAINTAINED BY THE STATES.

THERE ARE SEVERAL REASONS WHY DUE PROCESS DEMANDS THAT A STATE PROSECUTOR NOT BE ALLOWED TO MAKE STATEMENTS TO A JURY INDICATING HIS PERSONAL BELIEF AS TO THE GUILT OF THE ACCUSED. FIRST, THE ACCUSED HAS A RIGHT TO INSIST THAT THE PROSECUTOR FOLLOW THE GENERAL ETHICAL RULES OF THE LEGAL PROFESSION. SECOND, SUCH COMMENTS ARE PER SE PREJUDICIAL AND VIOLATE THE BASIC NORM OF OUR SOCIETY THAT ON ACCUSED IS ENTITLED TO A FAIR TRIAL. THIRD, SUCH COMMENTS REQUIRE A DEFENSE LAWYER TO MAKE A DECISION AS TO WHETHER HE MUST ARGUE TO THE JURY HIS PERSONAL OPINION AS TO THE INNOCENSE OF THE DEFENDANT IN ORDER TO PROTECT HIS CLIENT OR NOT MAKE SUCH A PERSONAL

ARGUMENT IN ORDER TO REMAIN ETHICAL.

THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE REQUIRES A PROSECUTOR TO OBEY THE BASIC ETHICAL RULES OF THE LEGAL PROFESSION

FORMER CANON 15 OF THE AMERICAN BAR ASSOCIATION CANONS OF PROFESSIONAL ETHICS PROVIDED, IN PERTINENT PART, THAT IT IS IMPROPER FOR A LAWYER TO ASSERT IN ARGUMENT HIS PERSONAL BELIEF IN HIS CLIENT'S INNOCENCE OR IN THE JUSTICE OF HIS CAUSE. SIMILARLY, THE AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, PROVIDE, IN §5.8(B) OF "THE PROSECUTION FUNCTION" THAT IT IS UNPROFESSIONAL CONDUCT FOR THE PROSECUTOR TO EXPRESS HIS PERSONAL BELIEF OR OPINION AS TO THE TRUTH OR FALSITY OF ANY TESTIMONY OR EVIDENCE TO THE GUILT OF THE DEFENDANT. AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY DISCIPLINARY RULE 7-106(C) WHICH HAS BEEN ADOPTED AND WAS IN EFFECT IN SOUTH

CAROLINA AT ALL TIMES RELEVANT IN THIS CASE, PROVIDES THAT A LAWYER SHALL NOT ASSERT HIS PERSONAL OPINION AS TO THE GUILT OR INNOCENCE OF AN ACCUSED.

THERE CAN BE NO QUESTION THAT AN EXISTING AND WELL ACCEPTED NORM OF THE LEGAL PROFESSION IN THE UNITED STATES IS THAT A PROSECUTOR IS NOT PERMITTED TO OFFER HIS PERSONAL OPINION AS TO THE GUILT OF THE ACCUSED. THE QUESTION THAT THEN ARISES IS WHETHER THE DUE PROCESS RIGHTS OF A DEFENDANT ARE VIOLATED WHEN THE PROSECUTOR FALLS BELOW THIS NORM.

THE SUPREME COURT HAS PREVIOUSLY HELD THAT UNETHICAL TRIAL CONDUCT ON THE PART OF A STATE PROSECUTOR IS A VIOLATION OF DUE PROCESS. FOR EXAMPLE, THE COURT HELD IN YICK WO V. HOPKINS, 118 U.S. 356(1886), THAT SELECTIVE PROSECUTION VIOLATES THE RIGHTS OF A DEFENDANT TO DUE PROCESS. IN BRADY V. MARYLAND, 373 U.S. 83(1963), THE

SUPPRESSION BY THE PROSECUTION OF MATERIAL EVIDENCE FAVORABLE TO AN ACCUSED WAS HELD VIOLATIVE OF DUE PROCESS. IT WAS HELD IN NAPUE V. ILLINOIS, 360 U.S. 264, 269(1959) THAT DUE PROCESS IS VIOLATED "WHEN THE STATE, ALTHOUGH NOT SOLICITING FALSE EVIDENCE, ALLOWS IT TO GO UNCORRECTED." SIMILARLY, A SOLICITATION OF FALSE EVIDENCE BY A STATE PROSECUTOR VIOLATES DUE PROCESS. MOORE V. ILLINOIS, 408 U.S. 786, 797(1972); SEE ALSO MILLER V. PATE, 386 U.S. 1, 7(1967) ("(T)HE FOURTEENTH AMENDMENT CANNOT TOLERATE A STATE CRIMINAL CONVICTION OBTAINED BY THE KNOWING USE OF FALSE EVIDENCE.") IN CONTEXTS DIFFERENT FROM THAT OF THE IMMEDIATE CASE, THE ABOVE LINE OF AUTHORITIES DEMONSTRATES THAT UNETHICAL TRIAL CONDUCT BY STATE PROSECUTORS VIOLATES DUE PROCESS.

THIS RULE SHOULD BE EXTENDED TO COVER COMMENTS BY A PROSECUTOR AS TO HIS PERSONAL BELIEF IN THE GUILT OF AN ACCUSED. AN

ACCUSED HAS A RIGHT TO EXPECT THAT A PROSECUTOR WILL OBEY THE ACCEPTED EITHICAL NORMS OF THE LEGAL PROFESSION WHEN THE ACCUSED EXERCISES HIS RIGHT TO TO TO TRIAL RATHER THAN PLEAD GUILTY. SIMILARLY, DEFENSE COUNSEL SHOULD BE JUSTIFIED IN MAKING A SIMILAR ASSUMPTION WITH REGARD TO HIS PUBLIC ADVERSARY.

COMMENTS BY A STATE PROSECUTOR INDICATING HIS PERSONAL BELIEF IN THE GUILT OF THE DEFENDANT ARE PER SE VIOLATIONS OF THE FOURTEENTH AMENDMENT

AS IS AMPLY DEMONSTRATED BY THIS CASE, A STATE PROSECUTOR MAY ATTEMPT TO THROW THE WHOLE WEIGHT OF THE LAW ENFORCEMENT MACHINERY OF A STATE AGAINST THE DEFENDANT. THE COMMENT BY THE PROSECUTOR IN THIS CASE INDICATED TO THE JURY THAT NOT ONLY DID THE PROSECUTOR BELIEVE THE DEFENDANT GUILTY, BUT THAT STATE AND LOCAL LAW ENFORCEMENT AGENCIES HELD SIMILAR OPINIONS.

THE BASIC REASON BEHIND THE DUE PROCESS CLAUSE IS THE ASSURANCE THAT EVERY CRIMINAL DEFENDANT IN A STATE CASE MUST BE FURNISHED A TOLERABLY FAIR TRIAL. NEXT TO THE INTRODUCTION OF FALSE EVIDENCE OR THE DENIAL OF COUNSEL, IT IS DIFFICULT TO IMAGINE ANYTHING MORE UNFAIR OR PREJUDICIAL TO A DEFENDANT THAN A STATEMENT BY THE PROSECUTOR TO THE JURY THAT HE AND THE LAW ENFORCEMENT OFFICERS INVOLVED IN THE CASE BELIEVE THE DEFENDANT TO BE GUILTY. THIS SHOULD BE CONSIDERED A PER SE VIOLATION OF THE FOURTEENTH AMENDMENT.

COMMENTS BY A STATE PROSECUTOR INDICATING HIS PERSONAL BELIEF IN THE GUILT OF THE ACCUSED HAMPER THE ACCUSED'S COUNSEL IN CONDUCTING AN EFFECTIVE DEFENSE

AFTER THE PROSECUTOR MAKES A COMMENT INDICATING HIS PERSONAL BELIEF IN THE GUILT OF THE ACCUSED, DEFENSE COUNSEL FACES A DIFFICULT DECISION. THE ATTORNEY CAN, AS

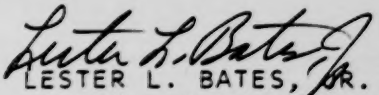
WAS DONE IN THIS CASE, MERELY OBJECT TO THE COMMENT IN THE HOPE THE JURY WILL DISREGARD IT. BUT AN ATTORNEY MAY WELL BE TEMPTED TO ARGUE TO THE JURY THAT HE PERSONALLY BELIEVES IN HIS CLIENT'S INNOCENCE IN ORDER TO COUNTER THE STATEMENTS OF THE PROSECUTOR. THIS, OF COURSE, WOULD VIOLATE DISCIPLINARY RULE 7-106(C).

A STATEMENT SUCH AS WAS MADE BY THE PROSECUTION IN THIS CASE LEAVES DEFENSE COUNSEL WITH A HOLSON'S CHOICE. HE MUST EITHER FAIL TO RESPOND TO THE UNETHICAL STATEMENTS OF THE PROSECUTION AND RISK DAMAGING HIS CLIENT'S CASE DRAMATICALLY OR COMMIT A BREACH OF A DISCIPLINARY RULE IN ORDER TO PROTECT HIS CLIENT.

IT IS SUBMITTED THAT TO REQUIRE SUCH A DECISION TO BE MADE BY DEFENSE COUNSEL RUNS COUNTER TO THE FAIR TRIAL CONCEPT OF THE DUE PROCESS CLAUSE.

FOR THE FOREGOING REASONS, THE PETITIONER RESPECTFULLY REQUESTS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION BELOW.

RESPECTFULLY SUBMITTED,



LESTER L. BATES, JR.
COUNSEL FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 198__

NO. _____

DANNY BARWICK,

PETITIONER,

-VS-

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

APPENDICES TO

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE

STATE OF SOUTH CAROLINA

APPENDIX A

IN THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE, ... RESPONDENT,

DANNY BARWICK, ... APPELLANT.

APPEAL FROM SUMTER COUNTY
ERNEST A. FINNEY, JR., JUDGE

OPINION NO. 21932
FILED MAY 26, 1983

AFFIRMED

CHARLES L. GRIFFIN, III, OF SUMTER; AND SCOTT ELLIOTT, OF COLUMBIA, FOR APPELLANT.

ATTORNEY GENERAL T. TRAVIS MEDLOCK RETIRED ATTORNEY GENERAL DANIEL R. MCLEOD, ASSISTANT ATTORNEY GENERAL HAROLD M. COOMBS, JR., AND STAFF ATTORNEY CARLISLE ROBERTS, JR., ALL OF COLUMBIA; AND SOLICITOR R. KIRK MCLEOD, OF SUMTER, FOR RESPONDENT.

==========

GREGORY, A. J.: APPELLANT DANNY BARWICK WAS CONVICTED OF TWO COUNTS OF FORGERY, ONE COUNT OF BREACH OF TRUST, AND ONE COUNT OF

CRIMINAL CONSPIRACY, ALL ARISING FROM AN INCIDENT INVOLVING INSURANCE FRAUD. THE MAIN ISSUE ON APPEAL IS WHETHER THE TRIAL JUDGE SHOULD HAVE DISMISSED THE INDICTMENT BECAUSE OF PROSECUTORIAL MISCONDUCT. WE AFFIRM.

THREE TIMES DURING TRIAL APPELLANT OBJECTED TO QUESTIONS ASKED AND STATEMENTS MADE BY THE ASSISTANT SOLICITOR AND MOVED TO HAVE THE INDICTMENT DISMISSED. APPELLANT MADE CLEAR HE DID NOT WANT A MISTRIAL DECLARED. THE TRIAL JUDGE REFUSED TO DISMISS THE INDICTMENT.

DISMISSAL OF A CRIMINAL CHARGE IS A DRASTIC REMEDY. BOTH APPELLANT AND RESPONDENT CITE U. S. V. BANKS, 383 F.SUPP. 389 (D.S.D.1974) WHERE THE COURT DISMISSED THE CHARGES BECAUSE THE GOVERNMENTAL MISCONDUCT WAS EXTREMELY AGGRAVATED. THE COURT IN BANKS STATED AT 391:

> A MOTION FOR JUDGMENT OF DISMISSAL ON THE GROUNDS OF GOVERNMENT MISCONDUCT, ON THE OTHER HAND, USUALLY IS GROUNDED ON THE ALLEGATION THAT THE DEFENDANT CANNOT RECEIVE A FAIR TRIAL NOW OR AT ANY TIME IN THE REASONABLE FORESEEABLE FUTURE AND, THUS, CANNOT BE AFFORDED DUE PROCESS OF LAW. (CITATIONS OMITTED) (EMPHASIS ADDED)

HERE, THE THREE INSTANCES OF ALLEGED PROSECUTORIAL MISCONDUCT ARE (1) THE ASSISTANT SOLICITOR MISSTATED A STIPULATION THEREBY MATERIALLY PREJUDICING APPELLANT; (2) THE ASSISTANT SOLICITOR IMPLIED APPELLANT AND HIS COUNSEL ATTEMPTED TO SUBORN PERJURY; AND (3) THE ASSISTANT SOLICITOR ARGUED TO THE JURY HIS AND THE POLICE OFFICERS' BELIEF THAT APPELLANT WAS GUILTY.

NOTHING IN THE RECORD INDICATES, AND APPELLANT DOES NOT ARGUE, THAT APPELLANT COULD NOT RECEIVE A FAIR TRIAL IN THE

REASONABLE FORESEEABLE FUTURE. MOREOVER, THE ALLEGED PROSECUTORIAL MISCONDUCT HERE COMES NOWHERE CLOSE TO THAT IN BANKS, SUPRA, WHERE THE GOVERNMENTAL MISCONDUCT WAS SO AGGRAVATED THAT THE COURT FOUND THE INTERESTS OF JUSTICE DICTATED DISMISSAL. WE FIND NO ERROR IN THE TRIAL JUDGE'S REFUSAL TO DISMISS THE INDICTMENT.

APPELLANT NEXT ARGUES THE TRIAL JUDGE ERRED IN REFUSING TO INSTRUCT THE JURY TO DELIBERATE AS TO THE GUILT OR INNOCENCE OF APPELLANT WITH RESPECT TO ONLY THOSE OFFENSES FOR WHICH HE WAS INDICTED. APPELLANT SPECULATES THE JURY MAY HAVE CONVICTED HIM ON DOCUMENTARY EVIDENCE, A FICTITIOUS BILL OF SALE WHICH THE ASSISTANT SOLICITOR REFERRED TO AS A "FORGERY".

WHERE A REQUESTED CHARGE IS FULLY AND FAIRLY COVERED BY THE TRIAL JUDGE'S GENERAL CHARGE, REFUSAL OF A REQUESTED INSTRUCTION IS NOT ERROR. 18 WEST'S SOUTH CAROLINA

DIGEST, TRIAL, KEY NO. 260 (1). THE INDICTMENT DETAILED THE SPECIFIC CHARGES FOR WHICH APPELLANT WAS INDICTED. THE TRIAL JUDGE INSTRUCTED THE JURY APPELLANT SHOULD BE FOUND GUILTY OR ACQUITTED "OF THE CHARGES PENDING IN THIS INDICTMENT." THE JURORS WERE GIVEN A VERDICT FORM WHERE THEY WOULD WRITE BY EACH COUNT "GUILTY" OR "NOT GUILTY." THE TRIAL JUDGE INSTRUCTED THE JURY TO REFER TO THE INDICTMENT IN REACHING THEIR VERDICT WITH RESPECT TO EACH CHARGE. WE FIND THE TRIAL JUDGE'S CHARGE FULLY AND FAIRLY COVERED RESPONDENT'S REQUESTED INSTRUCTION.

ACCORDINGLY, WE AFFIRM APPELLANT'S CONVICTION.

AFFIRMED.

LEWIS, C. J., LITTLEJOHN, NESS AND HARWELL, JJ., CONCUR.

APPENDIX B

(TRIAL TRANSCRIPT, PP. 889, 890)

BY SOL. KOLB: ...AND I'LL TELL YOU THIS, THESE OFFICERS, SHERIFF REEVES AND WAYNE SIMS AND SLED AGENT JOHN JOHNSON, MYSELF, AND THE OTHER PEOPLE THAT HAVE BEEN INVOLVED IN IT, FOLKS, WE WOULDN'T BE HERE IF WE DIDN'T BELIEVE IN THIS CASE ---

BY ATTY. GOLDMAN: YOUR HONOR ---

BY SOL. KOLB: ---AND I'LL TELL YOU WHAT ---

BY THE COURT: YES SIR, SUSTAINED WITH REGARD TO THAT COMMENT. I ASK THE JURY TO DISREGARD ---

BY SOL. KOLB: LET ME PUT IT THIS WAY ---

BY THE COURT: NO SIR, SOLICITOR, LET ME FINISH.

BY SOL. KOLB: ALL RIGHT, SIR.

BY THE COURT: THAT'S IMPROPER.

BY SOL. KOLB: YES, SIR, I, I MEANT ---

BY THE COURT: ALL RIGHT, GO RIGHT AHEAD.

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 198__

NO. _____

DANNY BARWICK, PETITIONER, -VS- THE STATE OF SOUTH CAROLINA, RESPONDENT.	NOTARIZED STATEMENT

LESTER L. BATES, JR., ESQUIRE, BEING DULY SWORN, DEPOSES AND STATES;

1. THAT HE IS AN ATTORNEY-AT-LAW DULY LICENSED BY THE STATE OF SOUTH CAROLINA.

2. THAT HE IS A MEMBER OF THE BAR OF THIS HONORABLE COURT AND WAS ADMITTED TO AFORESAID BAR ON MAY 24, 1965.

3. THAT ON SEPTEMBER 12, 1983 MAILED FORTY (40) COPIES OF THIS PETITION TO THE HONORABLE CLERK OF THE SUPREME

COURT OF THE UNITED STATES BY DEPOSITING AFORESAID COPIES IN A MAILBOX LOCATED IN THE MAIN UNITED STATES POST OFFICE IN COLUMBIA, SOUTH CAROLINA, WITH FIRST-CLASS POSTAGE PREPAID, AND PROPERLY ADDRESSED TO THE CLERK OF THIS COURT WITHIN THE TIME ALLOWED FOR FILING.

4. THAT ON SEPTEMBER 12, 1983, HE MAILED THREE (3) COPIES OF THIS PETITION TO THE HONORABLE T. TRAVIS MEDLOCK, LEAD COUNSEL FOR THE RESPONDENT, BY DEPOSITING AFORESAID COPIES IN A MAILBOX LOCATED IN THE MAIN UNITED STATES POST OFFICE IN COLUMBIA, SOUTH CAROLINA, WITH FIRST-CLASS POSTAGE PREPAID AND PROPERLY ADDRESSED TO THE HONORABLE T. TRAVIS MEDLOCK WITHIN THE TIME ALLOWED FOR FILING.

5. THAT THIS STATEMENT IS MADE AND FILED IN ACCORDANCE WITH RULE 28 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

6. THAT ALL PARTIES REQUIRED TO BE SERVED IN THIS CASE HAVE BEEN SERVED, TO-WIT:

THE HONORABLE T. TRAVIS MEDLOCK
ATTORNEY GENERAL OF SOUTH CAROLINA
POST OFFICE BOX 11548
COLUMBIA, SOUTH CAROLINA 29211

Lester L. Bates, Jr.

LESTER L. BATES, JR.
POST OFFICE BOX 1485
COLUMBIA, S.C. 29202

September 12 1983

COLUMBIA, SOUTH CAROLINA

Sworn to before me
this 12th day of
September, 1983.

Joan R. Sinas
Notary Public of S.C.
My Commission Expires:
7/3/89

Office Supreme Court, U.S.
FILED
OCT 11 1983
ALEXANDER L. STEVAS,
CLERK

83-428

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1983

No.

DANNY BARWICK, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General

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Post Office Box 11549
Columbia, S.C. 29211

ATTORNEYS FOR RESPONDENT.

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T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211

ATTORNEYS FOR RESPONDENT.

QUESTION PRESENTED

Did the trial judge properly refuse to dismiss the indictment against Petitioner when the solicitor's statement that he and certain officers "believe in this case" did not constitute such aggravated and prejudicial misconduct as to warrant such a drastic remedy, and when any error was cured by the trial judge's instruction that the jury disregard the comment?

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IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1983

No.

DANNY BARWICK, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 21932, filed May 26, 1983, as reproduced in Petitioner's Appendix A at pages 1A-5A.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

Did the trial judge properly refuse to dismiss the indictment against Petitioner when the solicitor's statement that he and certain officers "believe in this case" did not constitute such aggravated and prejudicial misconduct as to warrant such a drastic remedy, and when any error was cured by the trial judge's instruction that the jury disregard the comment?

ARGUMENT

The trial judge properly refused to dismiss the indictment against Petitioner because the solicitor's statement that he and certain officers "believe in this case" did not constitute such aggravated and prejudicial misconduct as to warrant

such a drastic remedy, and because any error was cured by the trial judge's instruction that the jury disregard the comment.

Petitioner asks this Court to rule that a solicitor should not explicitly inject his personal opinion into the jury's deliberations. (Petition, p. 9). That rule, however, is already the law in South Carolina. State v. Koon, ___ S.C. ___, 298 S.E.2d 769 (1982); State v. Butler, 277 S.C. 543, 290 S.E.2d 420 (1982); State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981). Because the South Carolina Supreme Court agrees with Petitioner's position on this point, there is nothing for this Court to decide.

The South Carolina Supreme Court affirmed Petitioner's conviction, not because the solicitor's comment (that

he and certain law enforcement officers "believe in this case") was proper, but because Petitioner asked for an inappropriate remedy -- dismissal of the indictment. In its opinion in this case, the South Carolina Supreme Court stated that dismissal of a criminal charge is a drastic remedy. The court properly held that this case did not involve such extremely aggravated misconduct or serious, permanent prejudice as would warrant dismissal of the indictment.

Furthermore, the trial judge sustained Petitioner's objection. Contrary to Petitioner's assertion in his Petition (p. 10), the judge immediately instructed the jury to disregard the comment. (Petition, Appendix B). The solicitor's statement, in view of the judge's curative

instruction, did not deprive Petitioner of a fair trial. State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975).

Petitioner's argument for a Writ of Certiorari is without merit.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT.